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No. 16-894

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,
PETITIONERS
v.
STATE OF CALIFORNIA; COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his official capacity as Sheriff

AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 16th day of February, 2017, send out from Omaha, NE 4 package(s) containing 3 copies of the BRIEF OF THE GOVERNORS OF TEXAS, ARIZONA, ARKANSAS, IOWA, KANSAS, KENTUCKY, MAINE, SOUTH CAROLINA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 16th day of February, 2017.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

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No. 16-894

In The

Supreme Court of the United States

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, PETITIONERS

v.

STATE OF CALIFORNIA; COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his official capacity as Sheriff

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the brief of the governors as amici curiae in support of Petitioners contains 2,711 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 15, 2017.

Arthur C. D'Andrea

No. 16-894

In The

Supreme Court of the United States

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, PETITIONERS

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE GOVERNORS OF TEXAS, ARIZONA, ARKANSAS, IOWA, KANSAS, KENTUCKY, MAINE, SOUTH CAROLINA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE GOVERNORS OF TEXAS, ARIZONA, ARKANSAS, IOWA, KANSAS, KENTUCKY, MAINE, SOUTH CAROLINA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae are the Governors of Texas, Arizona, Arkansas, Iowa, Kansas, Kentucky, Maine, South Carolina, and South Dakota ("Amici Governors").[1]

---

[1] The parties in this case have consented to the filing of this brief and have received 10-day notice. No counsel for a party has authored this brief, in whole or in part, and no person, other than Amicus Curiae or its counsel, has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. Rule 37.6.

Amici have two interests in the outcome of this case. First, citizens in the Amici Governors' States should not be forced to choose between exercising their constitutional rights to bear arms and exercising their constitutional rights to travel to California. This Court has said that "the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). In fact, "the right is so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Ibid.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)). If citizens in a State like Texas need or want to travel to a State like California, they should not be forced to check their gun rights at the border.

Second, California bases its incapacious view of the right to bear arms on purported "public safety" concerns. But data from the Amici Governors' States proves that California's worries are unfounded. It is by now indisputable that concealed handgun license ("CHL") holders are disproportionately less likely to commit crimes. Therefore, California's "public safety" concerns should be rejected as pretextual.

Seeking to protect the constitutional rights of the citizens of their States, and to better inform the Court on the public safety justification offered in this lawsuit, the Amici Governors respectfully submit this brief in support of Petitioners.

SUMMARY OF THE ARGUMENT

The question presented is whether the State of California can single out one group of disfavored citizens—namely, gun owners—and impose unique burdens on their fundamental rights. If this were a case about speech, the right to counsel, or any of the myriad rights protected by the Fourteenth Amendment, every federal court in this country would reject California's arguments out of hand. Indeed, no other group of private citizens has to prove—to the satisfaction of a government official vested with unreviewable and boundless discretion—that they really need to exercise their fundamental constitutional freedoms.

California's only purported justification is that guns are somehow different because they pose unique "public safety" concerns. That blinks reality. It cannot be disputed that concealed-carry permit-holders are disproportionately less likely to pose threats to "public safety." And empirical evidence proves that concealed-carry laws either reduce crime or have no effect on it. Given that it cannot be justified by facts, California's efforts to ban the carriage of guns "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634 (1996).

That animus or irrational fear is no less unconstitutional here than it would be in any other area of constitutional law. As this Court has held, the Second Amendment does not create "a second-class right." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

ARGUMENT

I. California Is Wrong on the Law.

A. Outside of the context of guns, no federal court would countenance any effort by a State to condition the constitutional rights of its citizens on the unreviewable discretion of a sheriff to find "good cause" for their exercise. Imagine if California did any of the following:

- No speech unless a sheriff finds "good cause" for it;
- No public assembly unless a sheriff finds "good cause" for it;
- No religious exercise unless a sheriff finds "good cause" for it;
- Compelled searches, seizures, and arrests if a sheriff exercises unreviewable discretion to find "good cause" for them;
- No protection against double jeopardy if a sheriff finds "good cause" for dispensing with it;
- Compelled taking of private property if a sheriff finds "good cause" for it;
- No speedy trials if a sheriff finds "good cause" for dispensing with them;
- No public trials if a sheriff finds "good cause" for dispensing with them;
- No right to counsel if a sheriff finds "good cause" for dispensing with it;
- No right to avoid excessive bail if a sheriff finds "good cause" for dispensing with it;

- No right to avoid cruel and unusual punishment if a sheriff finds "good cause" for dispensing with it; or
- No right to anything protected by the Fourteenth Amendment if the sheriff finds "good cause" for dispensing with it.

Lawyers and non-lawyers alike would agree that those hypotheticals are absurd.

But when it comes to regulating gun rights, California thinks that the State can do things that would be unthinkable in other areas of constitutional law. To take just one of the examples above, it is well settled that the government cannot give public officials unbridled discretion to determine whether a would-be speaker has good cause to speak; that is because "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988); *see also Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992). As this Court held more than a half-century ago:

> It is settled by a long line of recent decisions of this Court that an

> ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub, 355 U.S. at 322.

B. When it comes to gun freedoms, though, California gives its sheriffs the same unbridled discretion that is anathema to other areas of constitutional law. To get a permit to carry a firearm, a Californian first must prove to the sheriff that he or she has "good moral character"—a vacuous standard that has an ignominious pedigree. For example, "[i]n 1960 the Mississippi state constitution was amended to add a new voting qualification of 'good moral character,' an addition which it is charged was to serve as yet another device to give a registrar power to permit an applicant to vote or not, depending solely on the registrar's own whim or caprice, ungoverned by any legal standard." *United States v. Mississippi*, 380 U.S. 128, 133 (1965) (footnote omitted).

Second, a Californian who wants to carry a gun also must prove to the sheriff's satisfaction "good cause" for exercising his or her constitutional rights. Crucially, "concern for one's personal safety alone is not considered good cause." *Peruta v. San Diego*, 742 F.3d 1144, 1148 (9th Cir. 2016). Rather, to establish "good cause," the applicant must supply "supporting

documentation" that proves that the applicant faces a "unique risk of harm." *Id.* at 1169. Examples of such "supporting documentation" include "restraining orders, [and] letters from law enforcement agencies or the [district attorney] familiar with the case." *Id.* at 1148. "If the applicant cannot demonstrate 'circumstances that distinguish [him] from the mainstream,' then he will not qualify for a concealed-carry permit." *Ibid.*

But that conception of "good cause" would turn the Constitution's text and meaning on its head. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. That is, the right belongs to "the people," not to some subset of "unique" people who can successfully convince a sheriff that they (unlike their more-common neighbors) really need to carry a firearm. *See also District of Columbia v. Heller*, 554 U.S. 570, 579-80 (2008). Thomas Cooley, the leading constitutional scholar after the Civil War, explained it this way:

> When the term 'the people' is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. . . . But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected.

THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF

AMERICA 267-68 (1880; reprint 2000) (interpreting the First Amendment); *see also id.* at 270-71 (interpreting the Second Amendment); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE AMERICAN UNION 350 (1880) (same); Heller, 554 U.S. at 617-19 (same). California's approach to carrying firearms—that the right extends only to some, and only to those who are somehow "unique"—flagrantly violates these principles.

California offers only one justification for treating the Second Amendment differently from all other constitutional provisions: "public safety." But this Court has emphatically rejected the notion that the government can use "public safety" concerns as a pretense for discriminating against gun rights. *See McDonald*, 561 U.S. at 782-83 (rejecting Chicago's argument "that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety"). Thus, California is wrong to suggest that its public safety concerns give the State a legal basis to impose special and draconian burdens on Second Amendment rights.

II. CALIFORNIA IS WRONG ON THE FACTS.

Not only is California wrong on the law; it is also wrong on the facts. The right to bear arms is a "fundamental" one, *see McDonald*, 561 U.S. at 767-80, which means it is the State's burden to put forward facts to prove that generally banning the carriage of firearms is narrowly tailored to serve a compelling interest, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972). And where the State's asserted interest fails even the most cursory inquiry, the Court must presume that it is a pretext for irrational animus. *See Romer*, 517 U.S. at 634.

California cannot come close to carrying that heavy burden in this case because the facts squarely undermine its "public safety" justification. It is a well-documented fact that concealed-carry permit-holders are disproportionately less likely to commit crimes. For example, here are the data from the last 10 years in Texas:

Table 1: CHLs and Public Safety[2]

Year	CHLs	CHLs' Crime	CHL Crime Rate	Pop.	Total Crimes	Total Crime Rate	CHL Relative Safety
2013	708,048	158	0.0223%	18.3 M	50,869	0.2774%	12.43
2012	584,850	120	0.0205%	17.9 M	63,272	0.3529%	17.20
2011	518,625	120	0.0231%	17.5 M	63,679	0.3632%	15.70
2010	461,724	121	0.0262%	17.2 M	73,914	0.4309%	16.44
2009	402,914	101	0.0251%	17.1 M	65,561	0.3840%	15.32
2008	314,574	86	0.0273%	16.7 M	65,084	0.3895%	14.25
2007	288,909	160	0.0554%	16.4 M	61,260	0.3742%	6.76
2006	258,162	144	0.0558%	16.1 M	61,539	0.3834%	6.87
2005	248,874	154	0.0619%	15.6 M	60,873	0.3910%	6.32
2004	239,940	105	0.0438%	15.2 M	63,715	0.4171%	9.53
AVG			**0.0361%**			**0.3763%**	**10.41**

As illustrated by these data, CHL holders *are more than 10 times less likely* to commit a crime in Texas as compared to the general population.

And it is not just the overall crime rate. Even for crimes that often involve guns—such as aggravated assault with a deadly weapon, or deadly conduct involving discharge of a firearm—the crime rate for CHL holders is much smaller than for the general population.

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[2] Source: Texas Department of Public Safety Annual Reports, www.txdps.state.tx.us/rsd/chl/reports/convrates.htm. *N.b.*, "Population," "Total Crimes," and "Total Crime Rate" are limited to individuals over the age of 21 to ensure an apples-to-apples comparison with the CHL crime rate; in Texas, individuals under 21 generally are ineligible for CHLs. *See* TEX. GOV'T CODE §§ 411.047, 411.172(a)(2).

Table 2: Aggravated Assault with a Deadly Weapon

Year	CHLs	CHLs' Crime	CHL Crime Rate	Population	Total Crimes	Total Crime Rate	CHL Relative Safety
2013	708,048	10	0.0014%	18,336,567	2,292	0.0125%	8.85
2012	584,850	6	0.0010%	17,929,526	2,852	0.0159%	15.51
2011	518,625	3	0.0006%	17,534,860	2,765	0.0158%	27.26
2010	461,724	3	0.0006%	17,154,807	3,079	0.0179%	27.62
2009	402,914	4	0.0010%	17,074,479	2,603	0.0152%	15.36
2008	314,574	0	0.0000%	16,709,525	2,600	0.0156%	∞
2007	288,909	7	0.0024%	16,370,817	2,513	0.0154%	6.34
2006	258,162	9	0.0035%	16,052,486	2,701	0.0168%	4.83
2005	248,874	5	0.0020%	15,568,595	2,632	0.0169%	8.41
2004	239,940	5	0.0021%	15,275,415	2,901	0.0190%	9.11
AVG			**0.0015%**			**0.0161%**	**10.98**

Table 3: Deadly Conduct Involving Discharge of a Firearm

Year	CHLs	CHLs' Crime	CHL Crime Rate	Population	Total Crimes	Total Crime Rate	CHL Relative Safety
2013	708,048	1	0.0001%	18,336,567	204	0.0011%	7.88
2012	584,850	1	0.0002%	17,929,526	266	0.0015%	8.68
2011	518,625	2	0.0004%	17,534,860	244	0.0014%	3.61
2010	461,724	2	0.0004%	17,154,807	389	0.0023%	5.23
2009	402,914	1	0.0002%	17,074,479	343	0.0020%	8.09
2008	314,574	0	0.0000%	16,709,525	244	0.0015%	∞
2007	288,909	0	0.0000%	16,370,817	203	0.0012%	∞
2006	258,162	1	0.0004%	16,052,486	177	0.0011%	2.85
2005	248,874	1	0.0004%	15,568,595	215	0.0014%	3.44
2004	239,940	0	0.0000%	15,275,415	201	0.0013%	∞
AVG			**0.0002%**			**0.0015%**	**6.81**

As illustrated by Table 2, a CHL holder in Texas is *11 times less likely* to commit aggravated assault with a deadly weapon. And as illustrated by Table 3, a CHL holder in Texas is *7 times less likely* to commit deadly conduct involving a firearm. And Texas is not unusual. *See, e.g.*, John R. Lott, Jr., *What A Balancing Test Will Show for Right-to-Carry Laws*, 71 MD. L. REV. 1205, 1212 (2012) (citing JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (3d ed. 2010)). The claim that CHL holders somehow create a "public safety" risk is counterfactual.

Not only are CHL holders dramatically less likely to commit crimes themselves, they also incentivize others to commit less crime. Would-be criminals are less likely to break the law when they know that their victims may be carrying firearms. Decades of empirical research prove this. *See, e.g.*, Lott, 71 MD. L. REV. at 1212 ("There have been five qualitatively different tests confirming that right-to-carry laws reduce violent crime. These studies show that violent crime falls after right-to-carry laws are adopted, with bigger drops the longer the right-to-carry laws are in effect."); *id.* at 1212-17 (collecting and analyzing studies). And while some have nitpicked that research in various ways, the most that the critics claim to show is that CHL laws have no effect on crime rates. *See, e.g.*, NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (2004) ("[T]he committee concludes that with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates."). Amici are aware of no research suggesting

that CHL laws increase crime or otherwise threaten public safety.

It might be true that statewide elected officials in California have strong political incentives to infringe "the right of the people to keep and bear Arms." U.S. Const. amend. II. But the Constitution never was intended to disappear where policymakers in Sacramento find it inconvenient, nor was it intended to protect only those rights that enjoy popular support or universal acceptance. To the contrary, the whole point of the Constitution's text is to protect certain unpopular rights from the zeal of a government bent on squelching them. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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